Re Ali @ Abdul Aziz bin Hassan; ex p HSBC Bank Malaysia Bhd

HIGH COURT (KUALA TERENGGANU) — BANKRUPTCY NO 29-667 OF 2000
NIK HASHIM J
16 MARCH 2003

Bankruptcy *— Notice — Application to set aside — Whether act of recovery of arrears of interest must be made within six years of judgment — Whether bankruptcy action a form of enforcement proceedings — Whether notice filed after six years from date of judgment time barred — Limitation Act 1953 s 6(3)*

On 14 December 1990, a consent judgment was recorded between the judgment creditor ('JC') and the judgment debtor ('JD'). The JC obtained leave of the court to execute the said consent judgment on 31 May 2000. The JC commenced bankruptcy proceedings on 15 August 2000. A bankruptcy notice ('BN') was served on the JD on 16 September 2000 claiming, inter alia, the judgment sum of RM111,021.63 and interest thereon from 16 April 1988 to 15 April 1994, ie a period of six years pursuant to the terms of the judgment. The JD applied to set aside the BN but the application was dismissed by the senior assistant registrar ('SAR') on 16 April 2002. The JD appealed. At the hearing, both parties agreed that the issue to be considered was whether the arrears of interest in the BN could be claimed when the BN was issued more than six years from the date of judgment in light of s 6(3) of the Limitation Act 1953 ('the Act').

Held, allowing the appeal with costs:

(1) '... the second limb of s 6(3) of the Act provides that an action to recover arrears of interest must be brought within six years of the judgment date and because of the word 'arrears', it cannot denote interest which is still not due. It must, therefore, mean arrears of interest at the time of recovery and cannot include future interest even if the amount due has not been paid. ... Thus, a person filing an action for recovery of arrears of interest on the last day of the six year period from the judgment date is only entitled to that amount and nothing more. If he files it on the first day after the six year period, his action is barred by limitation ....' (*United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385 followed) (see p 540C–D).

(2) The court held that the first limb of s 6(3) of the Act was not applicable in the present case. The applicable provision was the second limb of the section. The first limb was in respect of enforcement and by relying on s 2 of the Act as to the interpretation of the word 'action' to include 'other proceeding in court', the bankruptcy proceedings were not enforcement

proceedings but was an action on judgment commenced by way of bankruptcy proceedings (see p 541A–B).

(3) The court agreed with the learned counsel for the JD that the facts of the instant case were on all fours with the case of *Ernest Cheong*. As a court that was inferior to the Federal Court, the court was bound by the principal of stare decisis to accept loyally the decision in *Ernest Cheong*. For that reason, the court was unable to follow the decision in *Re Yau Kin Mun; ex p Public Bank Bhd* [1999] 5 MLJ 497 on the issue (see p 541C).

(4) The Federal Court in *Ernest Cheong* ruled that the act of recovery of the arrears of interest in respect of the judgment debt must be made within six years of the judgment date, but the BN was filed on 15 August 2000, long after the limitation period of six years that expired on 13 December 1996. Therefore pursuant to the second limb of s 6(3) of the Act, and following *Ernest Cheong*, the BN was rendered invalid for being filed out of time. The BN was barred by limitation (see p 541D–E).

[Bahasa Malaysia summary

Pada 14 Disember 1990, satu penghakiman persetujuan telah dirakamkan di antara si piutang penghakiman ('SPP') dan penghutang penghakiman ('PP'). SPP telah mendapatkan kebenaran daripada mahkamah untuk melaksanakan penghakiman persetujuan tersebut pada 31 Mei 2000. SPP telah memulakan prosiding kebankrapan pada 15 Ogos 2000. Satu notis kebankrapan ('NK') telah disampaikan ke atas PP pada 16 September 2000 menuntut, antara lain, jumlah penghakiman RM111,021.63 dan faedah daripada 16 April 1988 kepada 15 April 1994, iaitu satu tempoh enam tahun menurut terma-terma penghakiman. PP telah memohon untuk mengenepikan NK tetapi permohonan itu telah ditolak oleh penolong kanan pendaftar ('PKP') pada 16 April 2002. PP telah merayu. Di pendengaran, kedua-dua parti telah bersetuju bahawa isu yang perlu ditimbangkan adalah sama ada tunggakan faedah di dalam NK boleh dituntut kerana NK itu telah dikeluarkan lebih daripada enam tahun daripada tarikh penghakiman memandangkan s 6(3) Akta Had Masa 1953 ('Akta tersebut').

Diputuskan, membenarkan rayuan dengan kos:

(1) ' ... the second limb of s 6(3) of the Act provides that an action to recover arrears of interest must be brought within six years of the judgment date and because of the word 'arrears', it cannot denote interest which is still not due. It must, therefore, mean arrears of interest at the time of recovery and cannot include future interest even if the amount due has not been paid. ... Thus, a person filing an action for recovery of arrears of interest on the last day of the six year period from the judgment date is only entitled to that

amount and nothing more. If he files it on the first day after the six year period, his action is barred by limitation ... .' (*United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385 diikut) (lihat ms 540C–D).

(2) Mahkamah telah memutuskan bahawa bahagian pertama s 6(3) Akta tersebut tidak terpakai di dalam kes ini. Peruntukan yang terpakai adalah bahagian kedua seksyen itu. Bahagian pertama adalah berkenaan penguatkuasaan dan bergantung kepada s 2 Akta tersebut untuk tafsiran perkataan 'action' untuk termasuk 'other proceeding in court', prosiding kebankrapan bukan merupakan prosiding penguatkuasaan tetapi adalah tindakan di atas penghakiman yang dimulakan melalui prosiding kebankrapan (lihat ms 541A–B).

(3) Mahkamah bersetuju dengan peguam PP yang bijaksana bahawa fakta-fakta kes ini adalah serupa dengan kes *Ernest Cheong*. Sebagai mahkamah yang lebih rendah daripada Mahkamah Persekutuan, mahkamah ini terikat oleh prinsip stare decisis untuk menerima dengan setia keputusan *Ernest Cheong*. Untuk sebab itu, mahkamah tidak dapat mengikut keputusan di dalam *Re Yau Kin Mun; ex p Public Bank Bhd* [1999] 5 MLJ 497 pada isu ini (lihat ms 541C).

(4) Mahkamah Persekutuan di dalam kes *Ernest Cheong* memutuskan bahawa perbuatan mendapat kembali tunggakan faedah berkait dengan hutang penghakiman mesti dibuat di dalam tempoh enam tahun daripada tarikh penghakiman, tetapi NK difailkan pada 15 Ogos 2000, lama selepas had masa enam tahun yang luput pada 13 Disember 1996. Oleh itu, menurut bahagian kedua s 6(3) Akta tersebut, dan menurut *Ernest Cheong*, NK itu tak sah kerana difailkan di luar had masa. NK itu dihalang oleh had masa (lihat ms 541D–E).

Notes

For cases on applications to set aside bankruptcy notices, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue), paras 1708–1724.

Cases referred to

Abu Bakar bin PC Kuaya, Re; ex p Navaratnam a/l Sivasamboo (Unreported) (refd)

United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2002] 2 MLJ 385 (folld)

Yau Kin Mun, Re; ex p Public Bank Bhd [1999] 5 MLJ 497 (refd)

Legislation referred to

Limitation Act 1953 ss 2, 6(3)

Rules of the High Court 1980 O 46 r 2(1)(a)

A *R Sarengapani* (*Vendargon & Partners*) for the judgment debtor.
Vignesh Kumar (*Balendran Chong & Bodi*) for the judgment creditor.

Nik Hashim J:

The facts

B On 14 December 1990, a consent judgment between the judgment creditor ('JC') and the judgment debtor ('JD') was recorded. On 31 May 2000, the JC obtained leave of the court to execute the said consent judgment against the JD; this was done in compliance with O 46 r 2(1)(a) of the Rules of the High Court 1980. On 15 August 2000, the JC commenced bankruptcy C proceedings by requesting for the issuance of a bankruptcy notice ('BN'). The BN was served on the JD on 16 September 2000. In the BN, the JC claimed: (i) the judgment sum of RM111,021.63, (ii) interest thereon from 16 April 1988 to 15 April 1994, ie for a period of six years pursuant to the terms of the judgment and (iii) all payments received were taken into account and deducted accordingly. The JD applied to have the BN set D aside. On 16 April 2002, the senior assistant registrar ('SAR') dismissed the application. The JD appealed.

The issue

At the hearing of the appeal before me, it was agreed by both parties that E the issue to be considered by the court was whether the arrears of interest in the BN can be claimed when the BN was issued more than six years from the date of the judgment.

The contentions of the parties

F Learned counsel for the JD submitted that the BN, which included the arrears of interest, even though limiting itself for a period of six years only, and which was filed after the period of six years from the date of the judgment is bad in law and ought to be set aside, and cited the second limb of s 6(3) of the Limitation Act 1953 ('the Act') and the Federal Court case G of *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385 in support.

Learned counsel for the JC, on the other hand, argued that the BN could be filed at anytime after six years but before 12 years from the date when the judgment became enforceable as provided in the first limb of s 6(3) of the Act, and in support of his argument he relied on the High H Court case of *Re Yau Kin Mun; ex p Public Bank Bhd* [1999] 5 MLJ 497, which held that s 6(3) only prohibits the bringing of any action upon a judgment after the expiration of 12 years.

The findings of the court

I In *Ernest Cheong*, the appellant obtained summary judgment against the respondent on 15 October 1987 but the respondent failed to satisfy the judgment sum. The appellant then filed a bankruptcy notice ('BN') against

the respondent on 24 January 1996 for the sum of RM229,563.68 including accrued interest. The SAR dismissed the respondent's application to set aside the BN. However, the respondent was successful in his appeal to the judge in chambers who held that the BN was invalid as the act of recovery of the arrears of interest therein, with the issuance of the BN on 24 January 1996, was time-barred by virtue of s 6(3) of the Act. The appellant's appeal to the Court of Appeal was dismissed and hence the appeal to the Federal Court. The question before the Federal Court was whether, in respect of the second limb of s 6(3) of the Act, no arrears of interest on any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due. Abdul Malek Ahmad FCJ held, at pp 397–398:

> ... the second limb of s 6(3) of the Act provides that an action to recover arrears of interest must be brought within six years of the judgment date and because of the word 'arrears', it cannot denote interest which is still not due. It must, therefore, mean arrears of interest at the time of recovery and cannot include future interest even if the amount due has not been paid. ... Thus, a person filing an action for recovery of arrears of interest on the last day of the six year period from the judgment date is only entitled to that amount and nothing more. If he files it on the first day after the six year period, his action is barred by limitation, ...
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> ... although the amount of arrears of interest claimed is only for six years from the judgment date, the bankruptcy notice had been filed on 24 January 1996, long after the limitation period of six years which expired on 14 October 1993. Accordingly, the bankruptcy notice was rendered invalid.
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> ...
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> To answer the question posed, ... in view of the wording of the second limb of s 6(3) of the Act, the act of recovery of the arrears of interest in respect of the judgment debt must be made within six years of the judgment date and only up to the date of the act of recovery. [In the instant case], there was no formal defect or any irregularity ... and s 131 of the Bankruptcy Act [Bankruptcy Act 1967] is certainly not applicable. The only error of the appellant here was to file the bankruptcy notice out of time.

The above case was followed by the Kuantan High Court in the unreported case of *Re Abu Bakar bin PC Kuaya; ex p Navaratnam a/l Sivasamboo*, vide Bankruptcy No 29–487–2001 where the learned Judge Tengku Baharudin Shah on 4 July 2002 held that any claim of arrears of interest (even though limiting to six years) filed after the period of six years from the date of judgment was barred by limitation.

At this juncture, it is pertinent to reproduce s 6(3) of the Act and it states:

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

Whereas 'action' under s 2 of the Act includes a suit or any other proceeding in a court of law.

A The aforesaid provisions are quite clear. Therefore, applying the provisions to the facts, I hold that the first limb of s 6(3) of the Act is not applicable in the present case. The applicable provision is the second limb of the section. The first limb is in respect of enforcement and by relying on s 2 of the Act as to the interpretation of the word 'action' to include 'other proceeding in court', the bankruptcy proceedings, in my view, are not B enforcement proceedings but an action on judgment commenced by way of bankruptcy proceedings. The JC could by all means enforce the judgment before the expiry of 12 years from the date of the judgment. The JD is not challenging that but only the inclusion of the arrears of interest that had been filed after the period of six years from the date of the judgment in C bankruptcy.

With regard to the case law, I agree with the learned counsel for the JD that the facts of the instant case are on all fours with the case of *Ernest Cheong*. As a court that is inferior to the Federal Court, I am bound by the principle of stare decisis to accept loyally the decision in *Ernest Cheong*. For that reason, I am unable to follow the decision in *Re Yau Kin Mun* on the D issue.

The Federal Court in *Ernest Cheong* ruled that the act of recovery of the arrears of interest in respect of the judgment debt must be made within six years of the judgment date and only up to the date of the act of recovery. The JC here had limited the arrears of interest to only six years from E judgment date, but the BN was filed on 15 August 2000, long after the limitation period of six years that expired on 13 December 1996. Therefore, pursuant to the second limb of s 6(3) of the Act, and following *Ernest Cheong*, I hold that the BN is rendered invalid for being filed out of time. The BN is barred by limitation.

It is to be noted that the Federal Court case of *Ernest Cheong* was not F yet reported when the SAR dismissed the JD's application to set aside the BN. Had the SAR been made aware of the Federal Court's decision, I feel sure her decision might well be different as the facts in that case are not distinguishable from the facts in the present appeal.

In the result, the appeal is allowed with costs and the decision of the G learned SAR given on 16 April 2002 is hereby set aside, and the JD's application to set aside the BN is therefore allowed as prayed.

Appeal allowed with costs.

Reported by Chew Phye Aun

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